FIMA SECURITIES SDN BHD

v.

ROSE ALIZA RAMLI

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID JC
[CIVIL SUIT NO: D8-22-142-2000]
10 JANUARY 2005

CIVIL PROCEDURE: *No case to answer - Whether submission of no case to answer can be accepted where plaintiff has proven its case on balance of probabilities*

CONTRACT: *Shares, sale of - Contra losses - Client allowed to trade above initial trading limit without any additional security - Whether detriment to client*

SECURITIES: *Remisier - Relationship with client - Where remisier is client's husband - Whether client estopped from denying knowledge of transactions in her account*

The plaintiff was a licensed stock broking company. The defendant, by filling in an application form, opened an account with the plaintiff for the purpose of buying and selling shares listed in the KLSE, through the plaintiff. The application constituted an agreement and it contained terms and conditions to be fulfilled. The plaintiff claimed RM1,789,903.53 from the defendant, being contra losses and interest. The plaintiff called its sole witness, PW1. The original copy of the agreement could not be traced but a sample of the plaintiff's application form was produced. The evidence adduced through PW1's testimony, contract notes, contra statements, monthly statements and balance statement showed that the transactions were carried out in the defendant's account, causing losses to the plaintiff.

The remisier for the defendant's account was the defendant's husband, appointed by the defendant herself. The evidence showed that all the contract notes and contra statements were sent to the defendant's address. The defendant had not raised any complaints or issues on the transactions carried out in her account. The defendant's learned counsel in his submissions raised the issue that the plaintiff failed to produce any applications completed and signed by the defendant. Further, it was argued that the plaintiff had not produced any documents for transactions exceeding the approved limit to prove that instructions were given by the defendant. At the end of the plaintiff's

case, the defendant elected not to call any witnesses and made a submission of no case to answer instead. It was submitted that the plaintiff had failed to prove its case on the balance of probabilities.

Held:

[1] The plaintiff, through PW1, had proven their case on the balance of probabilities. The defendant elected not to call any evidence when the evidential burden of proof had shifted to her. (p. 124 f, g)

[2] The defendant's argument that she had nothing at all to do with the transactions and that she had no knowledge of them seemed absurd since the remisier responsible for conducting the transactions in her account was her husband. The defendant was estopped from denying that the transactions were properly carried out. She had never protested when all the contract notes, contra statement and monthly statement were sent to her address. The defendant was also estopped from denying the authority of the transactions as she failed to notify plaintiff of errors or discrepancies as provided in the contract notes, contra and monthly statements more so when the remisier was her husband. (p. 125 b, e)

[3] The fact that defendant was allowed to trade above any initial trading limit was no defence to the claim. The increase in the trading limit without any additional security was to the detriment of the plaintiff not the defendant. (p. 125 g)

Case(s) referred to:

BBMB Securities Sdn Bhd v. Lim Geok Lan [1997] 1 LNS 147 HC ***(refd)***

Chow Yew Hon & Ors v. Oon Kim Meng [1975] 19 ***(refd)***

Guthrie Sdn Bhd v. Trans Malaysian Leasing Sdn Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

Inter-Pacific Securities Sdn Bhd v. Fong Pin Yuen, D1-22-558-1998 (Unreported) ***(refd)***

Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Malayan Banking Berhad v. Lim Ghee Leng & Ors [1985] 1 CLJ 154; [1985] CLJ (Rep) 203 FC ***(refd)***

Ong & Co Pte Ltd v. Foo Sae Heng [1990] 1 CLJ 856; [1990] 3 CLJ (Rep) 820 HC ***(refd)***

Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Priyamas Export Corp Sdn Bhd v. Bank Buruh (M) Bhd [1998] 3 CLJ 742 CA ***(refd)***

RHB-Cathay Securities Pte Ltd v. Ibrahim Khan [1999] 3 SLR 464 ***(refd)***

Soo Yau Choo v. Capitalcorp Securities Sdn Bhd, R3-12-590-1998 (Unreported) ***(refd)***

Standard Chartered Bank v. Mukah Singh [1996] 3 MLJ 360 ***(refd)***
Tan Kim Khuan v. Tan Kee Kiat [1998] 1 CLJ Supp 147 HC ***(refd)***
Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 CA ***(refd)***
Wong Chong Chow v. Pan-Malaysian Cement Works Bhd [1980] 2 MLJ 75 ***(refd)***
Zalik Securities Sdn Bhd v. Tan Poon Ngee [1998] 1 AMR 478 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 34
Evidence Act 1950, ss. 60(1)(b), 90A(2), 101, 102, 114(g)
Securities Industry Act 1983, s. 121

Other source(s) referred to:
Halsbury's Laws of England, vol. 16 4th edn, para. 1064

For the plaintiff - Mohd Iskandar; M/s Gideon Tan Razali Zaini
For the defendant - K Ganesan; M/s Ganesan K & Muhamad Asri

Reported by Amutha Suppayah

JUDGMENT

Abdul Wahab Said JC:

The plaintiff is a licensed stock broking company and a member of the Malaysian Stock Exchange ("MSE"), then known as the Kuala Lumpur Stock Exchange ("KLSE"). The defendant opened an account with the plaintiff for the purpose of buying and selling shares listed in the KLSE, through the plaintiff. The defendant applied to open the account by filling in an application form.

The application constituted an agreement and it contained terms and conditions to be fulfilled. The terms dictate that the defendant:

> (2) undertake to make immediate payment against the delivery of stocks, shares, debentures and/or warrants purchased on my behalf. I further undertake to pay the amount of deposit required by you on purchase contracts made on my behalf. I further undertake to pay the amount of deposit required by you on purchase contracts made on my behalf. The balance of which (if any) will be paid immediately on delivery of stocks, shares, debentures and/or warrants upon request by you.
>
> (3) undertake to deliver to you promptly any stocks, shares, debentures and/or warrants you may have sold on my behalf.
>
> (4) Authorize you to sell out or buy in such stocks, shares, debentures and/or warrants as may be required to clear my position with you and I undertake to indemnify you against all losses in the event I fail to comply with para. 1, 2 and 3 above.

(5) Agree to pay you your costs of fund together with handling, service and other charges on the outstanding debit balance of my account, should there be a delay in settlement on my part.

The plaintiff claimed for the amount of RM1,789,903.53 from the defendant. It is for contra losses, including interest on RM1,010,002.17 at 18% per annum from 26 January 2000 until full settlement. The statement of issues to be tried had been marked as Bundle 'F'.

The plaintiff called its sole witness, Mr Yap Swee Foong, Senior Officer in the Recovery and Legal Affairs Division. PW1's Witness Statement dated 12 April 2004 was marked as "P-1". PW1 gave evidence about the agreement entered into between the plaintiff and the defendant. PW1 said that the original copy of the agreement could not be traced. He nevertheless produced a sample of the plaintiff's application form for the opening of the accounts. The form was tendered as "P-2". Every account holder must fill in the form before an account could be opened and before he could be allowed to conduct any transactions.

PW1 then went further to state that the terms and conditions for the opening of the account is as provided in P2, in cll. 1 to 16, especially cll. 5 to 16. Clause 5 is about cost of funds, service and other charges for outstanding balance. Clause 6 gives authority to the plaintiff to deal with the stocks, shares, warrants for the account, which had been purchased but not paid for. Clause 16 is related to the payment of late charges and contra loss after the last date for payment.

PW1 gave evidence that the defendant opened a "CDS" account with the Malaysian Central Depository ("MCD") to enable a scripless share transaction to be done by MCD with the defendant. This fact was not denied by the defendant and a Form for opening a CDS account had been signed by the defendant. This is in exh. "P3". The defendant had also enclosed a copy of her identity card when opening the said CDS account. It has been marked as "P-4". PW1 explained that if the defendant fails to settle the amount owing, late payment charges in the form of interest will be imposed. PW1 said that the remisier for the defendant's account is one Muhammad Azmi, the defendant's husband. The remisier obtained instructions from the defendant to sell and buy shares in her account. PW1 had given evidence on how a share sale and purchase transaction is carried out, from the time the remisier receives the instructions from the defendant who thereafter communicated it to the central buyer, who entered it into the plaintiff's computer system which is connected to the KLSE and lastly matched and confirmed.

PW1 gave evidence on the balance statement that was released by the plaintiff's computer as at 25 January 2000, marked as exh. "P5" (in pp. 3 to 4 of Bundle C). It showed details of the transaction that gave rise to the amount owing in the defendant's account. Under the heading "Contra Loss" in P5, there are transaction dates, contra statement reference numbers, the quantity and price of the shares transacted, the amount of losses and the interest imposed. Under the heading "summary of balances", all the contra losses were calculated and the amount owing stated.

He gave evidence that the P-5 showed the figure of RM1,789,903 as at 25 January 2000. 18% interest per annum was imposed on the amount owing. The rate was determined by the current market trends.

PW1 further gave evidence that the plaintiff would issue to the defendant contra notes a day after the date of transaction. Contra Notes on all purchases and sale of shares conducted in the defendant's account would be issued a day after the occurrence of the contra (a contra is the difference between the selling price and the purchase of shares). The plaintiff would also issue monthly statements to the defendant. These are all done in accordance with s. 121 of the Securities Act 1983.

The contra notes and contract notes were marked as exhs. P7 to P40 (pp 28 to 51 of Bundle C) whereas monthly statements were marked as P41 (pp 57-96 of Bundle C).

PW1 also gave evidence that all of the plaintiff's documents were sent to the defendant's address as stated in the agreement. The address is at No. 249, Jalan Datuk Sulaiman, Taman Tun Dr. Ismail, 60000 Kuala Lumpur. There is no dispute of the defendant's address.

PW1 had also explained that every contra note has the contra reference number, date, counter, remisier code, the defendant's address, contract reference number, date of the contract note, sale and purchase price of the shares, the quantity of the buying and selling of the shares and the contra amount. Likewise, every contract note contains the contract number, client's account number, remisier code, date of sale and purchase, quantity, price, amount purchased or sold, broker fee, contract stamp, clearing fee and amount. The system of issuing and delivery of contra notes and contract notes by the plaintiff is a system common to stock broking companies. The documents gave detailed information of all the transactions in her account.

Every contract note has a notice at the side that says: "Any error must be notified to us within 24 hours of receiving this contract". Similarly, every monthly statement contains a notice at the bottom that says: "Please refer to the Head

of Compliance on any discrepancy in the statement within 14 days from the date of this statement otherwise it shall be correct and in order".

PW1 said that a client could lodge a complaint with the plaintiff if he is not satisfied with the way a transaction in his account is conducted. However, the plaintiff has no record of any complaint from the defendant on the handling of her account.

PW1 explained in his examination-in-chief that a contra loss is when a share is bought at a higher price and sold lower. The difference is the contra loss. PW1 explained that after the defendant had not settled the amount owing in her account the plaintiff instructed its solicitors to commence legal action. The plaintiff's solicitors sent a Letter of Demand at the defendant's address at No. 249, Jalan Datuk Sulaiman, Taman Tun Dr. Ismail, 60000 Kuala Lumpur. The Letter of Demand was marked as exh. "P44".

During his Examination-in-Chief and Cross-Examination, PW1 said that transaction limit is not one of the terms in the agreement between the plaintiff and defendant. PW1, referring to P2, at the column "for office use only" explained that this is determined after the defendant signed the agreement. It is the plaintiff's internal matter and is at the plaintiff's discretion. Further, where a transaction limit is raised the client will benefit.

It was further adduced in evidence that the plaintiff at all material times had instructed that all remisiers comply with the "T+7 rule". However, there are situations where the "T+7 rule" had not been adhered to. This could happen where the share counter is suspended by the KLSE or where there are no buyers for that share counter. This could also happen where there is a problem with the share allocation in KLSE. PW1 said that there is no way that a non-compliance with client's instruction could occur. This is by virtue of the reason that sale and purchase contract notes, contra statements and monthly statements were all printed and sent to the defendant. The defendant had not raised any objections.

On the issue of interest, PW1 explained that the interest rate is determined by the current interest rate issued by Bank Negara for base lending rate.

At the end of the plaintiff's case, the defendant elected not to call any witnesses. The defendant's learned counsel made a submission of no case to answer instead. The plaintiff's counsel submitted that the plaintiff has succeeded in proving its case. The evidence adduced through PW1's testimony, contract notes, contra statements, monthly statements and balance statement showed that the transactions were carried out in the defendant's account, causing losses to the plaintiff.

As for the issue of entry into the plaintiff's computer system, the plaintiff said that evidence had been given that the entry was made in the plaintiff's ordinary course of business, in accordance with the provisions of the Securities Industry Act 1983. Section 121 of the Securities Industry Act 1983 read as follows:

> 121. Copy of an entry in the dealer's or fund manager's record as *prima facie* evidence of such entry.
>
> (1) Subject to this Act, a copy of an entry in the accounting records and other records of a dealer or fund manager shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.
>
> (2) A copy of an entry in the accounting records and other records of a dealer or fund manager shall not be received in evidence under the Act unless it is first proved that the said records were, at the time of making the entry, the ordinary records of the dealer or fund manager and that the entry was made in the usual and ordinary course of business and that the records are in the custody or control of the dealer or the fund manager.

The plaintiff's learned counsel submitted that all the above requirements had been met by the plaintiff. The record of transactions done in the defendant's account as adduced in PW1's evidence proved this.

On the issue of interest, learned counsel referred to PW1's evidence where it was said that rate of interest is in accordance with the current financial market situation. PW1 had also shown a sample of the plaintiff's application form. Clause 5 and 16 of exh. P-2, show that the plaintiff has the right to claim interest on the losses.

Learned counsel for the plaintiff referred to the Federal Court case of *Malayan Banking Berhad v. Lim Ghee Leng & Anor* [1985] 1 CLJ 154; [1985] CLJ (Rep) 203, where it was said at p. 156 (p. 205) that:

> It would of course have been better if the rate was stated. But the Defendants cannot say that they were not liable to pay interest merely because no rate was specified.

The plaintiff's learned counsel submitted on the effect of the defendant's election to submit no case to answer. According to the learned counsel, when the burden of proof had been discharged by the plaintiff, the evidential burden of proof then shifted to the defendant to prove her defence. The plaintiff's learned counsel referred to the cases of *Wong Chong Chow v. Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Tan Kim Khuan v. Tan Kee Kiat* [1998] 1 CLJ Supp 147 HC.

According to the plaintiff's learned counsel, the defendant's failure to open her case and in not calling any witnesses show that she has failed to prove her defence. He referred to the Supreme Court case of *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where it was stated that:

> If he did not call evidence, he would stand or fall on his submissions. This rule of procedure is one of essential justice and not a mere formality. Once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the Plaintiff must be assumed true.

Based on this premise, learned counsel for the plaintiff went on to analyse the evidence of the plaintiff's sole witness.

First, the plaintiff's evidence was said to have proven that the defendant had opened an account with the plaintiff for the purpose of buying and selling shares through the plaintiff. Based on the plaintiff work system, a client could transact with the plaintiff only after his share transaction account is opened.

From the evidence, the plaintiff's work system showed the following i.e. firstly acceptance and execution of instructions for buying and selling shares and secondly, the issuance of contract notes and the defendant's monthly statements.

PW1 gave an explanation as to the amount claimed by the plaintiff. The evidence had proven the accuracy of the amount owed by the defendant to the plaintiff. The fact that the transactions were all carried out in the defendant's account emanated from the instructions given by the defendant's representative.

The defendant herself appointed him. He also happened to be the defendant's husband.

The evidence shows that all the contract notes and contra statements were sent to the defendant's address. PW1 had shown that the defendant has knowledge of the transactions and had allowed them. They were all done by her representative. It was said in evidence that the defendant had not raised any complaints or issues on the transactions carried out in her account. It was also said that throughout the hearing, the defendant had not forwarded any documents or evidence to challenge the documents forwarded by the plaintiff.

The plaintiff's learned counsel submitted that the defendant appointed her own husband as remisier. Therefore, it is impossible that the defendant does not know of the movements in her own account. The transactions were carried out by her husband.

The plaintiff's learned counsel said that the fact that the defendant did not give evidence to challenge the above fact showed that she had knowledge of the transactions. The fact that the defendant had not lodged any complaints with the Malaysian Stock Exchange, the plaintiff or the Police showed that the defendant had authorised her husband to carry out all the transactions in her account. The case of *BBMB Securities Sdn Bhd v. Lim Geok Lan* [1997] 1 LNS 147 was referred to on this point. This case also concern a situation where a lady had appointed her husband as remisier but conveniently denied receiving the contra notes and contract note. The court found that she had knowledge of the transactions and had given implied authority to her husband and could not later turn around and say that she had no knowledge as that would be inequitable and unjust. Also on facts similar to the above case and the present one is *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 4 CLJ 16 where the court held that she had given a carte blanche to her husband to act on her behalf.

The monthly statements contain a requirement that the plaintiff's head of credit control must be notified of any discrepancies in the client's account within 14 days from the date of the statement. Therefore the learned counsel said it is the defendant's obligation to inform the defendant immediately if she has any complaints about any charge or payments accruing in her account. The defendant is estopped from disputing the plaintiff's claim against losses in her account. The plaintiff's learned counsel cited *Halsbury's Laws of England* vol. 16 4th edn. para. 1064. This paragraph says that when a person is required by law to speak or act on something, his inactivity amounts to a representation.

The plaintiff's learned counsel cited a line of cases on the issue of estoppel which comes into play when a client who receives contract notes and contra statements does not protest or complain within the time specified in the documents. The cases are *RHB-Cathay Securities Pte Ltd v. Ibrahim Khan* [1999] 3 SLR 464, *Inter-Pacific Securities Sdn Bhd v. Fong Pin Yuen*, D1-22-558-1998 (unreported) (Plaintiff's Bundle of Authorities - P) and *Soo Yau Choo v. Capitalcorp Securities Sdn Bhd*, R3-12-590-1998 (unreported) (plaintiff's bundle - Q).

The court, according to learned counsel for the plaintiff, may conclude that the defendant has knowledge of the transactions in her account since all the contract notes and monthly statements were sent to the defendant's address. The plaintiff referred to the case of *Ong & Co. Pte Ltd v. Foo Sae Heng* [1990] 1 CLJ 856; [1990] 3 CLJ (Rep) 820 on this point.

Learned counsel for the plaintiff concluded that the fact that the defendant did not protest upon receiving the contra notes, contra and monthly statements if so unauthorised proves that the transaction conducted in her account is legal. It estops the defendant from now raising any objections or complaint.

In the present circumstances, according to the learned counsel, it is not enough to merely deny that she ever received the said documents. Further, it was said that it is trite law that the burden in proving a case initially lies with the plaintiff. Since the plaintiff was said to have proven its case, the burden shift to the defendant to prove their defence. The plaintiff's learned counsel said that the defendant had not discharged the burden since she failed to dispute the transactions that were carried out in her account or that the documents were sent to her address.

The defendant's learned counsel in his submissions raised the issue that the plaintiff failed to produce any applications completed and signed by the defendant. PW1 gave evidence that before an account could exist there must be an agreement between the plaintiff and the defendant. PW1 agreed in his evidence that there is no agreement in writing. Therefore it was said that the plaintiff had not proven that the defendant had opened an account with the plaintiff.

P2, it seems has no significance according to the defendant's learned counsel. This is because P2 is just an empty application form, which does not state what the defendant permitted trading limit is, initially. Therefore, even though PW1 said the limit had been raised, he would not know how much the amount was, when it was raised and who raised it. The plaintiff had also not given any evidence of any applications from the defendant to raise the trading limit. PW1, it was said, had agreed when cross examined that one cannot transact without any trading limit. PW1 had also given evidence that the remisier has a duty to reconfirm any of the defendant's order for the purchase of shares.

Further, the defendant's learned counsel raised the issue about the plaintiff not producing any of the plaintiff's company telephone bills and approval memo for transactions exceeding the approved limit to prove that instructions were given by the defendant. This is so since PW1 had said that all communications were *via* telephone calls. Therefore each alleged order would certainly be reconfirmed by the remisier by telephone. The plaintiff had not given any evidence that the defendant was informed of any change in credit limit. PW1 said he agreed that the limit is RM30,000 but he also agreed that he was not certain as to the limit fixed for the defendant's account or that it was changed at any time. Learned counsel for the defendant also said that the plaintiff failed to prove at which point in time the defendant breached the agreement or fixed

the limit. PW1 during cross examination gave evidence that every client has a credit limit for buying shares. However, in his re-examination said that credit limit is not a criteria or a term of operating an account with the plaintiff.

As for the evidence of PW1, learned counsel for the defendant said that he is not the one that should have been called to give evidence since he is not the remisier who had personally handled the transactions in the defendants account. PW1 himself said that he has no personal knowledge of this action. PW1 also agreed that he is not the remisier personally in charge of the account and he had no communications with the defendant at all. PW1 agreed that all the evidence he had given was derived from the plaintiff company's records and he personally has no knowledge of the accounts. PW1 in his evidence had agreed that the defendant's account was handled by the remisier. During his examination-in-chief PW1 said that the remisier must obtain the approval of the plaintiff's management and handling of shares in contra manner is not allowed.

As for the documents produced by the plaintiff as exhibits, the defendant's learned counsel said that the plaintiff has failed to produce any proof of posting. No proof of posting was produced for reminder letters. No witnesses were called and no evidence were adduced as to who actually prepared the contracts or fed the information in the plaintiff's computer system.

Learned counsel for the defendant said that the plaintiff did not adduce any evidence on the interest claimed and how the plaintiff could claim it.

On the law regarding Burden of Proof, the defendant's learned counsel cited ss. 101 and 102 of the Evidence Act 1950 and the case of *Chow Yew Hon & Ors v. Oon Kim Meng* [1975] 19. The plaintiff, it was said by the defendant's learned counsel, had failed to adduce evidence of the existence of a contract between the plaintiff and the defendant. The plaintiff has produced contract notes but not through witnesses who are responsible for feeding the details in the system. On this point, the defendant's learned counsel cited s. 90A(2) of the Evidence Act 1950 and the case of *Standard Chartered Bank v. Mukah Singh* [1996] 3 MLJ 360. Learned counsel also cited s. 34 of the Contracts Act 1950 and the case of *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635.

Learned counsel for the defendant raised the issue about PW1's credibility as a witness. He was said to have given conflicting evidence and he does not have personal knowledge of the transactions. He was said to give evidence based on his own personal opinion. Learned counsel for the defendant also claimed that PW1 was not certain about a number of things relating to the transactions.

Learned counsel raised adverse inference under s. 114(g) of the Evidence Act for the plaintiff's alleged failure in producing evidence of any contract between the plaintiff and the defendant. Therefore it cannot be ascertained as to how much was the defendant's trading limit and whether the defendant had stated that she was a housewife.

As for the documents, learned counsel for the defendant said that a certificate under s. 90A(2) of the Evidence Act was not produced. There was no proof of posting of the documents. No evidence was given as to orders made by the defendant and no telephone bills were produced to show reconfirmation of the orders by the remisier. Lastly, the remisier was not called as a witness.

On s. 114(g) Evidence Act the defendant's learned counsel cited the cases of *Guthrie Sdn Bhd v. Trans Malaysian Leasing Sdn Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155, *Juahir bin Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 and *Priyamas Export Corp Sdn Bhd v. Bank Buruh (M) Bhd* [1998] 3 CLJ 742.

On PW1's evidence, learned counsel for the defendant said that it was inadmissible under s. 60(1)(b) Evidence Act 1950. This is because PW1 admitted that he was not the officer in charge of the account and that he has no personal knowledge of any orders made by the defendant. This is because orders made by the defendant were made by telephone and received by the remisier. PW1 admitted that the remisier put in the details in the computer.

Therefore he submitted that the plaintiff had failed to prove its case on the balance of probabilities.

Having heard the evidence adduced by the trial's sole witness, seen the exhibits and heard submissions given by counsels on both sides, I cannot help but disagree with learned counsel for the defendant. I am convinced that the plaintiff, through PW1, had proven their case on the balance of probabilities.

I find that the defendant, in electing not to give evidence and going for a submission of no case to answer had done so regardless of the fact that the effect is that her case would stand or fall on the strength of submissions. The Supreme Court decision in *Jaafar Shaari*'s case said it all. The defendant elected not to call any evidence when the evidential burden of proof had shifted to her.

After going through the submissions, it is immediately apparent that the defendant had not gone beyond merely denying that she received the contract notes and the contra statements. The fact that the plaintiff had not been able to produce the defendant's application form made the defendant even more

convinced that she can argue her way out. Her learned counsel had taken this opportunity to allege that there was no contract at all between the plaintiff and the defendant. Contrary to this, in her defence, defendant admitted being a client of the plaintiff except that she had no knowledge of those share transactions in issue.

The defendant's argument that she had nothing at all to do with the transactions and that she had no knowledge of them seems absurd. This is on the premise that the remisier responsible for conducting the transactions in her account is her husband. This puts her defence that she had not received the documents in serious doubt. The defendant, did not protest when the contract notes and contra statements were sent. This is a ground on which I could assume the fact that she had knowledge of the transactions. On this I agree with *BBMB Securities Sdn Bhd v. Lim Geok Lan* [1997] 1 LNS 147 where it was said that:

> There was not a single protest from the defendant on the receipt of the contra notes if the defendant did not authorise her husband or for that matter anyone else on her behalf, one would expect her to vehemently protest but none was given. Instead she came to the court and conveniently denied receipt of the contra notes and the statement of accounts. Be that as it may, it was my finding that the defendant's husband's transaction in her account with the plaintiff was done with the knowledge and implied authority of the defendant.

The defendant is estopped from denying that the transactions were properly carried out. She had never protested when all the contract notes, contra statement and monthly statement sent to her address. The defendant is also estopped from denying the authority of the transactions as she failed to notify plaintiff of errors or discrepancies as provided in the contract notes, contra and monthly statements more so when the remisier is her husband.

In our case, the husband is not a mere third party but a remisier appointed by the defendant to conduct the transactions on her behalf. Her conduct is inconsistent with her stance. It proved that the transaction was validly done without protestation from her. The fact that defendant was allowed to trade above any initial trading limit is no defence to the claim. The increase in the trading limit without any additional security is to the detriment of the plaintiff not the defendant.

On why the defendant would take such a course, in denying any hand in the transactions that were done in her account, I could only refer to the fate that had befallen similar individuals and corporations in decided cases. I agree with the case *Zalik Securities Sdn Bhd (now known as HLG Securities Sdn Bhd) v. Tan Poon Ngee* [1998] 1 AMR 478 cited by learned counsel for the plaintiff where Selvintharanathan J said:

a

The court also took judicial notice of the fact that all the transactions relating to the shares were carried out at the tail end of what became known as "the super bull run" on the KLSE, which peaked in the second half of 1993 towards early 1994 and then tapered off, before falling sharply. During the super Bull Run, prices of the shares traded on the KLSE soared to an all-time high towards the end of 1993 and then began tumbling in 1994. Many punters who went into contra-trading on the KLSE then, had their fingers burnt badly when process fell drastically. This is a notorious fact.

b

Having understood the facts and evidence before me, and considered the law as it stands, I am satisfied that the plaintiff had proven its case against the defendant. I thereby ordered the defendant to pay the sum of RM1,789,903.53 with interest at 18% from 26 January 2000 on the sum of RM1,010,002.17 until realisation with costs.

c

d

e

f

g

h

i